"firmly believe", again "I have formed the irresistible conclusion" and also his use of the words "In the circumstances I believe fraud has been clearly established." The evidence in reference to this allegation of fraud in this case was based in my view on credibility of witnesses and also circumstantial evidence. The learned judge rejected the evidence of the defendants and substantially he did so on the credibility of these witnesses. I do not think we should interfere with such a finding. In my view having regard to the evidence of these two witnesses as found by the learned judge and also the circumstances of the case, the learned judge was right in concluding that fraud had been clearly established.

Mr. Palasuntharam further submitted that the first defendant's title to the said land is now indefeasible in view of section 340 of the National Land Code. He went on further to say that if there had been fraud or fraudulent misrepresentation on the part of the defendants it was fraud or fraudulent misrepresentation which induced the Registrar of Titles to act and not a fraud or fraudulent misrepresentation which induced the plaintiff to act, and also that the first defendant as trustee had a legal duty and a legal right to have the transfer to her as trustee registered, and to get into her keeping, documents and titles to the said lands. For that reason he submitted that her title is indefeasible and that the defendants acted correctly.

Section 340 provides as follows: —

"340(1) The title or interest of any person or body for the time being registered as proprietor of any land, or in whose name any lease, charge or easement is for the time being registered, shall, subject to the following provisions of this section be indefeasible.

(2) The title or interest of any such person or body shall not be indefeasible —

(a) in any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party of privy; or

(b) where registration was obtained by forgery, or by means of an insufficient or void instrument; or

(c) where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law.

(3) Where the title or interest of any person or body is defeasible by reason of any of the circumstances specified in sub-section (2) —

(a) it shall be liable to be set aside in the hands of any person or body to whom it may subsequently be transferred; and

(b) any interest subsequently granted thereout shall be liable to be set aside in the hands of any person or body in whom it is for the time being vested:

... ... "

I regret I am unable to accept counsel's arguments. The learned judge found as a fact that the second defendant knew that the plaintiff had cancelled the transfer. This is corroborated by Mr. Devaser's evidence. Therefore, second defendant had no further authority to proceed with the registration. Notwithstanding all that he secured the memorandum from Mr. Devaser and falsely represented that he had authority to proceed with the registration when in fact he knew he had no such authority. Having obtained the memorandum he proceeded to make a declaration falsely that the grants were lost and in fact falsely represented that the plaintiff had agreed to the registration when in fact second defendant knew that it was not true. On those findings the learned judge was right in holding that there was ample evidence to establish fraud or misrepresentation within the requirements of section 340(2) of the National Land Code.

In my view it would be sufficient for the purpose of section 340(2) to support an allegation of fraud or fraudulent misrepresentation to prove that by means of fraud or misrepresentation the registration of the transfer was obtained and that the first defendant was a party or privy to the fraud or fraudulent misrepresentation.

In my view therefore the appeal should be dismissed with costs. The deposit of the appellants should be paid towards the taxed cost of the respondent.

Ong Hock Sim and **Raja Azlan Shah F.JJ.** concurred.

Appeal dismissed.

Solicitors: *V. K. Palasuntharam; V. Manuel & Co.*

TAN TAI HEE v. PUBLIC PROSECUTOR

[A.Cr.J. (Mohamed Azmi J.) May 10, 1974]
[Kuala Lumpur — Criminal Appeal No. 228 of 1973]

Dangerous Drugs — Possession of opium smoking utensils — Possession of opium — Drug addict or pushers — Assessment of sentence — Dangerous Drugs Ordinance, 1952, ss. 9(1)(b) and 10.

The appellant aged 37 had pleaded guilty to two charges under the Dangerous Drugs Ordinance 1952. The first charge was under section 10 of the Ordinance for being in possession of two smoking pipes and other opium utensils. The second charge was under section 9(1)(b) for being in possession of ten ounces of prepared opium and eleven ounces of opium dross. He had one previous record for similar offences and the learned President sentenced him to six months imprisonment on each of the two charges — the sentences to run concurrently. The appellant was dissatisfied with the said order on the grounds, *inter alia*, that he was now undergoing treatment at the General Hospital Kuala Lumpur and that the learned President erred in law in not seeking medical evidence before imposing the sentence of imprisonment.

Held: (1) in assessing sentence involving drugs, a distinction should be made between possession of such drugs by addicts and possession by pushers or carriers;

(2) under the circumstances, and having regard to the small quantity of chandu involved, the sentence imposed was manifestly excessive as it served no useful purpose and a sentence of fine would be imposed instead.

CRIMINAL APPEAL.

W. M. Lai (Miss) for the appellant.

T. S. Sambanthanmoorthy (Deputy Public Prosecutor) for respondent.

Mohamed Azmi J. (delivering oral judgment): On November 24, 1973 the appellant aged 37 years old pleaded guilty in the Sessions Court at Petaling Jaya on two charges under the Dangerous Drugs Ordinance No. 30/52. The first charge was under section 10 of the Ordinance for being in possession of two smoking pipes and other opium smoking utensils. The second charge was under section 9(1)(b) for being in possession of ten ounces of prepared opium and eleven ounces of opium dross. He had one previous record for similar offences and the learned President sentenced him to six months imprisonment on each of the two charges — the sentences to run concurrently. The appellant is dissatisfied with the said order on the

grounds, *inter alia*, that he is now undergoing treatment at the General Hospital Kuala Lumpur and that the learned President erred in law in not seeking medical evidence before imposing imprisonment sentence. The reason for sending him to prison is contained in the last paragraph of the learned President's grounds of judgment which states:

"It is apparent that the accused has been taking drugs ever since 1963. The conviction has not in any way deterred the accused from committing the offence. It is, in his own interest that I sentence him to 6 months imprisonment as a fine has not done him any good. The imprisonment term should force him to separate from the drug and I am of the opinion that the 6 months imprisonment will stop him from taking the drug in the future. As such I think a sentence of 6 months on each of the charges to run concurrently is just and fair in the circumstances."

It is therefore obvious that imprisonment was imposed more in the interest of the appellant because the learned President thought that by doing so the appellant's addiction to chandu could be cured, having regard to the fact that the imposition of fine in the previous conviction did not appear to do him any good.

In assessing sentence involving drugs, a distinction should be made between possession of such drugs by addicts and possession by pushers or carriers. Provided the quantity involved is comparatively small, as in the present case, consideration should also be given whether the drug concerned is chandu or it is the more dangerous type like morphine and cannabis (ganja). The appellant in this case is married with eight children, four of whom are still schooling. He is the sole breadwinner of the family and since his present conviction he has undergone medical treatment in Kuala Lumpur General Hospital for purpose of curing himself from his addiction to opium and is apparently now cured. In my view, there is no doubt that the appellant was an opium addict and this must also be the finding of the learned President when she heard the case as apparent in her grounds of judgment. Under the circumstances, and having regard to the small quantity of chandu involved, I hold that the sentence imposed is manifestly excessive as it serves no useful purpose. The very object of sending him to prison has been achieved and, as such, he should be given a last chance. In cases of this nature, public interest is best served if the addict is given more than one chance to get off the hook, and before sending an addict to prison for the purpose of curing him, it is advisable that medical opinion be sought to enable the court to impose an adequate sentence.

This appeal is accordingly allowed and the sentence of imprisonment is set aside and instead I impose a fine of $200 in default two months imprisonment on the first charge and $300 in default three months imprisonment on the second charge.

Appeal allowed.

Solicitors: *Adlan & Haji Suhaimi.*

PUBLIC PROSECUTOR v. KASMIN BIN SOEB

[A.Cr.J. (Mohamed Azmi J.) May 10, 1974]
[Kuala Lumpur — Selangor Criminal Appeal No. 121 of 1973]

Penal Code s. 411 — Stolen property — Dishonestly retaining stolen property — Presumption — Evidence Act, s. 114(a).

This was an appeal against the order of a magistrate acquitting the accused at the close of the prosecution case in respect of the alternative charge under section 411 of the Penal Code wherein he was alleged to have dishonestly retained stolen property to wit, one Honda generator, valued at $300, knowing or having reason to believe the same to be stolen property. The only evidence adduced connecting the accused with the crime was the fact that about three days after the property was stolen, he led the police to the place where the property was recovered.

Held: (1) the mere evidence of leading the police to a spot, even if hidden, falls short of proving retention; there was no evidence of possession to raise the presumption under section 114(a) of the Evidence Act;

(2) evidence that an accused person has pointed out objects or places to the police was of little value and was often prejudicial to the accused unless the information which led to the discovery was disclosed at the same time.

CRIMINAL APPEAL.

Lamin bin Haji Mohamed Yunus (Deputy Public Prosecutor) for the appellant.

Radzi bin Tan Sri Sheikh Ahmad for the respondent.

Mohamed Azmi J. (delivering oral judgment): This is an appeal against the order of the Magistrate at Klang in acquitting the accused at the close of the prosecution case in respect of the alternative charge under section 411 of the Penal Code wherein he was alleged to have dishonestly retained stolen property to wit, one Honda Generator, valued at $300, knowing or having reason to believe the same to be stolen property. The only evidence adduced connecting the accused with the crime was the fact that about three days after the property was stolen, he led the police to the place where the property was recovered. Whatever information the accused might have given to the police which led to the discovery was not adduced in evidence. That being the case, I agree with the learned magistrate, "that the mere evidence of leading the police to a spot, even if hidden, falls short of proving retention" There was no evidence of possession to raise the presumption under section 114(a) of the Evidence Act. As stated by the learned magistrate in his grounds of judgment, "what the prosecution managed to establish is that he had knowledge of the generator's whereabout". The fact that the generator was found in a sack in an undergrowth about 10 chains from the main road might well give rise to suspicion of his complicity in the crime, but suspicion can never be substitution for proof. Further, evidence that an accused person has pointed out objects or places to the police is of little value and is often prejudicial to the accused unless the information which led to the discovery is disclosed at the same time. There were kampong houses near the place where the generator was recovered. As far as leading the police to the place of discovery was concerned, there were at least two inferences that could be drawn in the absence of information given by the accused. Either the accused himself had hidden the stolen property there or he had come to know of its whereabouts through a third person. In a criminal case, the inference favourable to the accused should be drawn. Under the circumstances, the appeal is dismissed and the order of discharge and acquittal be affirmed.

Appeal dismissed.

Solicitors: *Radzi Sheikh Ahmad & Co.*